IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No. 499 of 2003
In
COMPANY APPLICATION No. 83 of 2002
In
COMPANY APPLICATION No. 267 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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AGRAWAL TEXTILES - Applicant
Versus
O.L. OF SHREE VRUNDAVAN PROCESSING MILLS PVT. LTD. & 5 - Respondents

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Appearance :
MRS SWATI SOPARKAR for Applicant.
OFFICIAL LIQUIDATOR for Respondent(s) : 1,
MR SV RAJU for Respondent(s) : 2,

MR RD DAVE for Respondent(s) : 3,
MR MAULIN R RAVAL for Respondent(s) : 4,
DS AFF.NOT FILED (N) for Respondent(s) : 5 - 6.
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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 22/12/2005

ORAL JUDGMENT

1.The applicant, namely, Agrawal Textiles has taken out this Judges' Summons seeking direction to disburse the amount realised by him on sale of the assets of the Company in liquidation amongst the Unsecured Creditors.

2.One Mr. Bharat R. Agrawal, the proprietor of the applicant firm has filed the affidavit in support of the Judges' Summons. Mrs. Swati Soparkar, learned advocate appearing for the applicant has submitted that the applicant is an unsecured creditor of the Company in liquidation to the tune of Rs. 1,90,300/- and has lodged its claim before the Official Liquidator on or around October, 2000. She has

further submitted that the applicant has supplied goods to the company in liquidation to the tune of Rs.1,90,300/- somewhere in the year 1984 – 85. The Company has been taken into liquidation and O.L. took the possession of the assets of the Company (In Liquidation). The assets which include machineries, book debts, stock in trade, land and building etc. were sold and Rs.1,83,52,067/- were realised. The said amount was distributed amongst Punjab National Bank which claimed to be the Secured Creditor and Workers in the ratio of 3 : 1 pursuant to the order dated 10.05.2000 passed by this Court (Coram :- K.M. Mehta, J.).

3.Mrs. Swati Soparkar has further submitted that the present applicant and two other applicants being Unsecured Creditors have subsequently filed Company Application No. 267 of 2000 raising the grievance that the amount given to PNB had been in excess of its rightful claim.

Though the said Bank was secured creditor only in respect of the machineries, book debts and stock-in-trade and that the land and buildings of the Company were not mortgaged with the Bank, the Bank was treated as a Secured Creditor in respect of the entire assets of the Company. The valid share was agreed in favour of the Bank only on the plant and machineries, book debts and stock in trade and the amount realised on sale of the properties so charged was only Rs. 21 Lacs and the Bank would claim proportionate share only form this amount. After hearing the parties, this Court (Coram :- K.M. Mehta, J.) reviewed his previous order dated 10.05.2000 and by a sepaking order dated 17.04.2001 held that the land and building of the Company in liquidation were not charged with the Bank and recalled its earlier order dated 10.05.2000 with a direction to PNB to return the amount to the O.L. within 15 days from the date of receipt of the said order.

4.She has further submitted that PNB has subsequently preferred an appeal being O.J. Appeal No. 20 of 2001 against the said order and the said appeal was disposed of by the Division Bench of this Court vide order dated 17.09.2001 with liberty being reserved to the Bank to take appropriate proceedings for claiming its dues as a Secured Creditor with specific reference to the properties over which the Bank claims security. Such proceedings would be taken out by the Bank by 30.10.2001 and till such an application is decided, the amount already paid over by the O.L. to PNB pursuant to the order dated 10.05.2000 shall be treated as a deposit made by the O.L. with the said Bank and such deposit shall be abide by the final outcome of the proceedings.

5.Being aggrieved by the said order, the Bank has taken up the matter to the Hon'ble Supreme

Court by way of filing Special Leave Petition which was also dismissed by order dated 08.01.2002. However, the Hon'ble Supreme Court has extended the time to file an application till 28.02.2002.

6.She has further submitted that the said Bank thereafter filed an application being Company Application No. 83/2002 and this Court (Coram :- B.J. Shethna, J.) vide its order dated 27.09.2002, directed the Bank to pay the amount realised out of sale of immovable properties to O.L. latest by 30.10.2002 with interest at the prevailing Bank rate. Pursuant to the aforesaid order, the Bank has returned the amount to the O.L. in November, 2002. As per the provisions contained in the Companies Act, 1956, on receipt of the said amount and after the claim of the Secured Creditors is fully satisfied, the O.L. is duty bound to disburse the said amount amongst the Unsecured

Creditors.

7.Mrs. Swati Soparkar has further submitted that pursuant to the claims invited by the O.L., the applicant has lodged its claim before him. Even prior to lodging of the claim, the applicant has vide its letter dated 29.12.1999 and 24.01.2000 requested the O.L. to clear the dues which were pending since 1984. Since the amount was not disbursed despite the repeated request, the applicant has filed the present application before this Court. She has, therefore, submitted that necessary directions may be issued to the O.L. to disburse the amount to the Unsecured Creditors with interest and costs.

8.The Official Liquidator has filed his report on 24.11.2003. In the said report, he has submitted that pursuant to the advertisement issued by him on 02.10.2000 inviting claims

from Secured and Unsecured Creditors of the Company, the applicant has filed its claim with the O.L. on 01.11.2000. He has received claims from five parties which are as under :-

Rohit Textiles	Rs.52,804/-
Sudhir Enterprises	Rs.13,686/-
Agrawal Textiles	Rs.1,90,300/-
Mahesh Textiles	Rs.41,569/-
Ahmedabad Municipal Corporation	Rs.57,31,306/-

9.He has further submitted that PNB had submitted that its outstanding dues from the Company were to the tune of Rs.6,57,84,696/- and the said Bank had originally claimed to be the Secured Creditor for the said amount. On investigation of the claim of the Bank by M/s. Haribhakti & Co., Chartered Accountants, an amount of Rs.1,83,52,067/- only was found to be admissible and payable to the said Bank. Later on, it was decided by this Court vide order dated 17.04.2001 that the Bank's claim was

secured to the extent of Rs. 21 Lacs only since the plant and machineries etc. over which the Bank was having a charge was sold for Rs. 21 Lacs only. Thus, an amount of Rs.1,05,11,200/- was paid to the Bank on 23.06.2000 erroneously treating the entire amount of Rs.1,83,54,067/- as secured claim. However, subsequently pursuant to the order dated 27.09.2002 passed by this Court, the Bank has refunded the excess payment of 84,11,200/- along with interest of Rs.12,86,683/- retaining an amount of Rs. 21 Lacs. He has, therefore, submitted that the secured claim of the Bank amounting to Rs. 21 Lacs was fully satisfied and for rest of the amount being Rs.1,62,52,067/-, the Bank was considered to be an Unsecured Creditor.

10.The O.L. has further stated in his report that the workers of the company claimed an amount of Rs.74,69,954/-. But on verification and investigation of the claim of the workers by

M/s. Haribhakti & Co., it was found that the workers were entitled to an amount of Rs.44,25,494/- only as other preferential creditor under Section 529-A of the Companies Act, 1956 be treated at par with the Secured Creditor. The workers have, therefore, got an amount of Rs.34,88,800/- pursuant to the order passed by this Court on 10.05.2000 as per the ratio fixed by the C.A. The claims of the workers were still unsatisfiable to the extent of Rs. 9,36,634/-. Therefore in his report, he has submitted that in order to bring the workers at par with the Secured Creditors, workers should be paid the remaining amount of Rs.9,36,694/- before any payment is made to any Unsecured Creditor. On the date of filing of the said report, the O.L. was having the balance of Rs.1,11,29,010/- in the Company's Account. He has also summarized the claims of the Creditors as well as the workers which are as under :-

Overriding Preferential claim of workers under Section 529-A.	Rs.9,36,694/-
Preferential claims being Govt. dues, revenue, taxes etc. under Section 530 i.e. AMC's dues of Property tax.	Rs.57,31,306/-
Ordinary Unsecured Claims :-	
Punjab National Bank	Rs.1,62,52,067
Claims received by O.L.	Rs.2,98,359/-
Other Unsecured Creditors as per Statement of Affairs	Rs.96,99,253/-
	Rs.2,62,49,679

11.He has further submitted that the claims of Rs.2,98,359/- received by him are appearing in the list of Unsecured Creditors as per statement of affairs and the amounts payable to unsecured creditors as per the statement of affairs are for Rs.99,97,612/-.

12.The O.L. has further submitted in his report that for the purpose of making payment to the unsecured creditors, after fully paid to the

overriding preferential share of the workers and the preferential claims of the Government, it is necessary for the O.L. to give the notice to prove debt to all the Creditors who have not filed their claims pursuant to the advertisement but are named as Creditors in the statement of affairs, as required by Rule 148 of the Companies (Court) Rules, 1959. So far as the overriding preferential claim of workers and unsecured creditor PNB are concerned, it does not seem to be necessary to carry out any further exercise for admission of their claims as their claims are already investigated by M/s. Haribhakti & Co., C.A. So far as the preferential claim of Ahmedabad Municipal Corporation is concerned, no further exercise for admission of its claim is necessary in view of the affidavit of proof or debt filed by the Ahmedabad Municipal Corporation and the copies of outstanding municipal tax bills. However, so far as the unsecured claim of the applicant

and unsecured claims received pursuant to the advertisement and the unsecured debt of the creditors, named, in the statement of affairs are concerned, it is necessary to examine this claim for the purpose of admission in whole or in part or rejection as the case may be in terms of Rules 159 and 160 of the Companies (Court) Rules, 1959, subject to the right of appeal against rejection of claim in part or in whole available to the creditors under Rule 164 of the Rules. He has, therefore, requested the Court to permit him to pay an amount of Rs.9,36,694/- to the workers of the Company as over riding preferential claim under Section 529-A of the Act and also to permit him to pay an amount of Rs.57,31,306/- to the Ahmedabad Municipal Corporation as preferential claim under Section 530 of the Act. He has further requested the Court to dispense with the requirement of issuing notices to the unsecured creditors named in the statement of affairs as

per Rule 148 (2) of the Rules and for issuing directions to the applicants and other three unsecured creditors who have filed their claims pursuant to the advertisement, to produce before him the further evidences in support of their claims.

13.Based on the aforesaid report of the O.L., the Court has passed an order on 17.03.2004 permitting the O.L. to disburse a sum of Rs.9,36,694 so as to satisfy the preferential claim of the workers. The O.L. was further directed to take necessary step and negotiate with the Ahmedabad Municipal Corporation so as to avail of existing scheme of rebate which was in operation till 31.03.2004. The applicant was also directed to furnish the details required by the O.L. in his report. The O.L. was further directed to call for the necessary details from the remaining three unsecured creditors.

14.In compliance with the direction issued vide order dated 17.03.2004 and 25.03.2004, the O.L. has placed on record a statement showing reconciliation of figures and communication dated 26.03.2004 received by Fax from Deputy Assessor and Tax Collector, East Zone, Ahmedabad Municipal Corporation. In light of this communication and the statement of reconciliation, the Court directed to join Ahmedabad Municipal Corporation as a party – respondent in the present proceedings and issued notice by order dated 26.03.2004. The Court further recorded the submissions of Mr. R.D. Dave, learned advocate appearing on behalf of the workers' Union and also taken on record compilation of 23 pages produced by him to point out that there was an error in the report dated 24.11.2003 of the O.L. wherein the claim of the workers of the Company in liquidation has been worked out at a net figure of

Rs.9,36,694/- on the basis of gross figure of Rs.44,25,494/-. The Court has further recorded the submission of Mr. Dave that the correct figure ought to have been Rs.60,90,925/- after taking into consideration two different reports given by the C.A., namely, reports dated 07.10.1999 and 04.05.2000. The Court has further recorded the submission of Mr. Dave that the entitlement of the workers, on the basis of the ratio already worked out, would be Rs.26,02,125/- which was liable to be reduced further by figure of Rs.9,36,694/- which has already been directed to be paid to the workers vide order dated 17.03.2004. The Court has, therefore, directed the O.L. to verify this position.

15.Pursuant to the aforesaid order dated 26.03.2004, the O.L. has placed his further report dated 31.03.2004 wherein it is stated that on verification of the claim of the

workers, the total outstanding claim on the date of filing of the said report was Rs.16,65,431/- as in the earlier report, the figure of the claim taken at Rs.44,25,494/- was based only on one report of the C.A. and inadvertently, second report dated 04.05.2000 had been left out from consideration. The workers are entitled to further sum of Rs.16,65,431/- after taking into consideration as regards payment of Rs.9,36,694/- vide order dated 17.03.2004. The Court has, therefore, permitted vide its order dated 01.04.2004 to disburse a sum of Rs.16,65,431/- to the workers so as to satisfy their preferential claim. The Court has also recorded the submission made by Mrs. Swati Soparkar to the effect that on the basis of decision of this Court rendered in Company Application No. 3 of 2001 on 26.03.2004, the O.L. is not required to make payment of any dues to Ahmedabad Municipal Corporation. The Court has, however, not taken

any decision and left it to be decided at the appropriate stage subsequently.

16.On notice being issued to Ahmedabad Municipal Corporation, a detailed reply was filed. In the said reply, both on facts as well as on law, it was urged that AMC should be treated as the preferential Creditor and its dues being in the nature of property tax should be satisfied first before any disbursement is made in favour of unsecured Creditors. A detailed statement was also annexed along with the reply which shows that the principal amount of Rs.52,01,058/- and interest of Rs.55,03,939/- aggregating total as of Rs.1,07,04,997/- is outstanding from the company in liquidation. Mr. Maulin Raval, learned advocate appearing for AMC has submitted that the property in question is assessed for property tax every financial year and tax was not paid though bills were raised and duly served on the

premises of the property in question. He has further submitted that the purchaser of the property, though served with the notice has chosen not to appear and no action whatsoever has been taken against the purchaser by the O.L. to comply with the terms and conditions of the sale of the property. The O.L. or Sale Committee or whosoever has not issued or given any notice of transfer of property as contemplated under Rule 3 and under Chapter (VIII) of the Bombay Provincial and Municipal Corporation Act. As per the provisions of Taxation Rules and more particularly, Rule 30 of Chapter (VIII) of the Rules, the owner/occupier of the property is primarily liable to pay property tax. No notice as contemplated under Rule 3 has been given by the O.L. despite the fact that the AMC has time and again issued and served bills in every financial year and has also lodged its claim before the O.L.

17.He has further submitted that Section 141 of BPMC Act creates first charge on the property on which the property tax is outstanding and, therefore, irrespective of the owner / occupier being a Company or individual, AMC is entitled to the property irrespective of winding up proceedings or any other mortgage, charge etc. All other mortgages or charges or proceedings with regard to the said proceedings will be and are subject to the first charge of AMC. Section 529-A of the Companies Act deals with the position of Secured Creditors. AMC is more than a secured creditor since the first charge of AMC will over ride all other mortgages, charges etc. The AMC's charge is a statutory charge and is created by operation of law. The term “Secured Creditor” is not defined under the Companies Act. The term “Secured Creditor” is described in the Law Lexicon, which means a person holding mortgage, charge or lien on the

property of the debtor or any part thereof. AMC is by all means a secured creditor having first charge and hence, better placed than any other Creditor whether Secured or unsecured. Since the AMC has the first charge on the property, AMC will be entitled to disbursement and satisfaction of its dues before any Creditors including Secured Creditors. The charge is on the property and, therefore, all mortgages or charges created by the Secured creditors which makes them Secured Creditors are weaker than and subject to the first charge of AMC. He has, therefore, submitted that AMC's dues must be paid even prior to payment of dues of the Secured Creditors. The Unsecured Creditors like the present applicant have no right whatsoever to claim any disbursement before the payment of AMC's dues. Mr. Raval relied on the decision of this Court in the case of *Ahmedabad Municipal Corporation V/s. Saurashtra Paints [2002] 43 (2) G.L.R.*

1109 wherein it is held that Section 141 created a charge and gave priority over other charges or mortgages irrespective of point of time at which it came into existence. Ordinarily, when a charge is created, it would rank after any charge or mortgage created prior in point of time. However, such ordinary ranking according to the order in which the charges or mortgages are created is displaced by the Rule enacted in Section 141 and that Section declared that the charge created under it shall be a first charge so that it will have priority even over the charges and mortgages created earlier in point of time. It is further observed that whether the charge was a first charge or a second charge makes no difference so far as the rule as to enforceability of the charge enacted in the second para of Section 100 was concerned and such charge whatever be its ranking cannot be enforced against a transferee for value without

notice. The Court has observed that the scope and object of Section 141 and second paragraph of Section 100 are fundamentally different. The former provides for the creation and ranking of the charge while the latter provides for the enforceability of the charge against the property in the hands of a transferee.

18.Mr. Raval has alternatively submitted that if the AMC's dues are considered preferential in view of Section 530, the outstanding amount as on 1992 would be approximately Rs.13,77,858/-. The order of winding up was passed in February, 1993 and hence, the period of 12 months from the said date would be added to the above referred amount and if the Court had to consider the AMC's claim as per the provisions contained in Section 530 of the Act, the amount outstanding upto the March, 1994 will have to be paid to the AMC first before any amount is paid to any other unsecured Creditors. He has,

therefore, submitted that AMC's dues should either be satisfied full keeping in mind the provisions contained in Section 529-A or the said dues of the AMC should be satisfied to the extent provided in Section 530 of the Act.

19.Mr. R.D. Dave, learned advocate appearing for the Workers' Union has submitted that though the claim of the workers is fully satisfied, the workers have received an amount of Rs.60,90,925/- by virtue of the provisions contained in Section 529-A of the Act. However, their outstanding claims were to the tune of Rs.1,00,54,925/- and hence, the balance amount of Rs.39,64,000/- should be treated as the claim of an unsecured Creditor.

20.After having heard the learned advocates appearing for the respective parties and after having gone through their respective pleadings as well as the documents produced on record and

the authorities cited before the Court, the Court is of the view that since the Secured Creditors and workmen dues have been fully paid, the claim of the preferential Creditors will have to be examined under Section 530 of the Act. In light of the decided cases, the claim of the Ahmedabad Municipal Corporation will have to be considered keeping in mind the provisions contained in Section 141 read with Section 530 of the Companies Act, 1956. Mr. Raval's first submission that AMC has first charge on the property and, therefore, is entitled to disbursement and satisfaction of its dues before any creditors including Secured creditors, is not weighed with the Court. Even the Division Bench judgment of this Court in *Ahmedabad Municipal Corporation V/s. Saurashtra Paints (Pvt.) Ltd. (2002) 43 (2) G.L.R. 1109* is not of much assistance and is distinguishable on facts. It is the case of a Company which is going concern. The present case is of a

Company which is under liquidation. Section 529 of the Companies Act makes application of insolvency rules in winding up of the insolvent Companies. Section 529-A discusses about preferential payments and it starts with non-obstente clause and says that notwithstanding anything contained in any provision of this Act or any other law for the time being in force, in the winding up of a Company. Workmen's dues and debts due to Secured creditors to the extent such debts rank under Clause (c) of the Proviso to Sub-section (1) of Section 529 pari passu with such dues, shall be in priority to all other debts. Section 530 talks about preferential payments and says that in a winding up (subject to the provision of Section 529-A, there shall be paid) in priority to all other debts.

21.The combined reading of the Provisions contained in Sections 529, 529-A and 530 makes

it abundantly clear that by virtue of non-obstente clause in S. 529-A, the applicability of Section 141 of BPMC Act is excluded and hence, it cannot be said that AMC is entitled to disbursement and satisfaction of its dues before Secured creditors. The claim of AMC will have to be examined under Section 530 of the Act. Clause (a) of Section 530 (1) says that all revenues, taxes, cesses and rates due from the Company to the Central or a State Government or to a local authority at the relevant date as defined in Clause (c) of Section 8 and having become due and payable within the twelve months next before that date. Sub-clause (i) of Clause (c) of Section 530 (8) states that the expression 'the relevant date' means – in the case of a Company ordered to be wound up compulsorily, the date of the appointment (or first appointment) of a provisional liquidator, or if no such appointment was made, the date of the winding

up order, unless in either case the Company had commenced to be wound up voluntarily before that date. Mr. Raval has submitted that the winding up order is passed in February, 1993. The outstanding amount as on 1992 was approximately Rs. 13,77,858/- 12 months period from this date will be added thereto. AMC is, therefore, entitled to the disbursement and satisfaction of its dues as on February, 1994. The Official Liquidator is, therefore, directed to pay this amount to AMC.

22.After the aforesaid payment is made to AMC, the remaining amount will have to be disbursed amongst the unsecured Creditors whose claims have been lodged verified and proofs of debts were furnished before the Official Liquidator. As per the statement furnished to the Court, the dues of Punjab National Bank, workmen, other Creditors and AMC as unsecured Creditors are Rs. 1,54,67,677/-, Rs. 39,64,000/-,

Rs.2,84,677/- and Rs. 57,31,306/- respectively. The amount payable to AMC under Section 530 will have to be deducted from this amount. Since other creditors have not lodged their claims despite such claims having been invited, the said claims are not required to be considered. The Official Liquidator is, therefore, directed to make payment to all the aforesaid creditors including the petitioner in their respective proportion within one month from the date of receipt of writ or receipt of certified copy of this order, whichever is earlier. The Official Liquidator is permitted to prematurely encash the fixed deposit receipts for the purpose of making such payment, if need so arises.

23. Subject to the above directions and observations, this application is accordingly disposed of.

S*avariya* **[K.A. PUJ, J.]**